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LEGISLATION PROVIDING FOR A NEW STATUTORY SICK PAY SCHEME IN IRELAND

The issue of a statutory entitlement to sick pay poses a dilemma for policymakers across developed economies. As Pollak\(^1\) argues, when attempting to optimize statutory sickness compensation benefits, policymakers are faced with a trade-off between protecting workers against the risk of income loss in the event of temporary work incapacity, while at the same time restricting moral hazard in order to limit public spending. To date, Ireland has remained one of the few advanced economies in Europe that does not provide workers with a statutory right to paid sick leave. It has been argued by trade unions that sick pay is viewed as a perk that employers can decide to include or not in a contract of employment\(^2\). Around half of all employers offer some form of paid sick leave, many workers have no such entitlement\(^3\).

In lieu of that, workers are entitled to claim Illness benefit, which is a short-term payment from the State made while workers are unable to work due to illness. Indeed, during the global financial crisis of the late 2000’s one of the measures recommended by the Troika (European Commission, European Central Bank and the International Monetary Fund) was the introduction of a statutory sick pay scheme. They encouraged reforms that would require employers to pay for the first two to four weeks of sickness, with the aim of reducing the financial burden borne by the state\(^4\). At the time government did act on that recommendation, however they amended illness benefit entitlement such that workers rather than employers carried the cost of the reform\(^5\). The issue of sick pay in the Irish context remained largely under examined until the pandemic. The Covid-19 pandemic has drawn attention to the negative consequences of not having a statutory arrangement in place, with reports from various sectors of workers attending work while ill, displaying symptoms or being unable to self-isolate as they could not afford to take unpaid time off from their employment\(^6\).

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5 Ibid.
The pandemic provided renewed impetus to introduce a statutory sick pay scheme in Ireland, to address those issues of « presenteeism » where workers attend their workplace while being unwell. This was highlighted by employee representative bodies as an area of significant concern, not just from an employee rights perspective, but also given the significant public health implications. The Irish Congress of Trade Unions (ICTU) began a campaign for legislation to make sick pay mandatory for all workers. The campaign won cross-party support from government and opposition parties⁷.

In response to pressure from social partners, the Irish government launched a public consultation process on the introduction of a statutory sick pay scheme. Resulting in the latter half of 2021, of the publication of the Sick Leave Bill 2021⁸, which outlines how the scheme will provide employees with a statutory entitlement to a minimum period of paid sick leave from their employer if they fall ill or are injured preventing them from being able to work. The Government published its draft Sick Leave Bill 2021, on November 4, the Bill will be examined by the Joint Committee on Enterprise, Trade and Employment before progressing to the next phase of legislative development. In next section, we provide details of the current system and contrast that with the proposed scheme. We outline the principles underpinning the legislative change, how the legislation will take effect on a phased basis over the next four years and discuss the implications for employers and employees. We conclude with an overview of the social partners reaction to the Bill, and consider some of the unintended consequences that may emerge.

I - CURRENT SITUATION

Under the current provisions in Ireland, all workers with a sufficient number of social insurance contributions are entitled to avail of state funded illness benefit while unable to attend work. As is the case in many social insurance systems a period of three « waiting days » exist where no payment is made, with the payment being made available from the fourth day of illness. The rate of illness benefit is standardised and not linked to employees' regular rate of pay, which has raised concerns among employee representative bodies around its sufficiency as an income replacement⁹. The Illness Benefit scheme was temporarily enhanced to deal with the circumstances presented by the Covid-19 pandemic, and the flat-rate increased to €350 per week, to support people to not attend work by protecting their income and addressing their financial concerns when they are in isolation. However, perhaps more important than the rate change was the amendment made to waiting days criteria. Under the changes introduced, the payment of illness benefit would apply from the first day of illness rather than the fourth. Thereby allowing an employee to comply with medical advice to self-isolate to mitigate the spread of the disease, while having their income protected¹⁰. This principle around the removal of waiting days and provision of immediate income replacement are central to the design of the new statutory sick pay (SSP) scheme.

⁷ ICTU (2021), Sick Pay is getting Better: http://www.ictu.ie/blog/sick-pay-getting-better
II - PROPOSED STATUTORY SICK PAY SCHEME

As currently drafted, the Bill provides that employees with 13 weeks’ continuous service will be covered by the scheme. This first criteria on eligibility has already drawn criticism from employer groups as being quite a short eligibility period \(^{11}\). The proposed statutory sick pay scheme is due to be rolled out in four phases beginning in 2022. The first phase of the scheme will see the introduction of an initial three days’ of sick pay per year from 2022, funded by the employer. Part 2 of the Bill stipulates that these sick leave days may be consecutive days or non-consecutive days, therefore for some workers in a one-off incidence of illness, the days could replace the unpaid « waiting day period » that applied under the state Illness Benefit scheme. This aspect of the Bill has also drawn criticism from employer groups with the argument being made that « where sick pay schemes are provided on a voluntary basis by employers or within collective agreements, payment is usually only provided after the first three days » \(^{12}\). The Department of Enterprise (DETE) has stated that the bill will « plug a well acknowledged gap in sick pay particularly for lower earners », of waiting days until employees can avail of State Illness Benefit \(^{13}\).

While the initial proposal is for the introduction of three days sick leave, the Bill allows for staggered increases in the number of days allowed under the scheme. Part 2 of the Bill states that the Minister for Enterprise, Trade and Employment will have the power to vary the number of statutory sick days, but prohibits the minister from reducing the number of statutory sick days below three days per year or from increasing the number of statutory sick days by more than three days per year. The Bill states that any ministerial order to increase the number of days must be at least 12 months apart. The regulatory impact assessment \(^{14}\) refers to extending to the scheme to 10 days’ paid sick leave in 2025, introduced on a phased basis over four years such that a staggered increase will allow employers to adapt, plan and budget for the shift in their financial obligations to employees. Thus the Government’s intention is to increase the sick day entitlement to five days in 2023; seven days in 2024; and 10 days in 2025 \(^{15}\). The scheme also brings an associated administrative duty on employers to retain records of statutory sick leave taken by each employee for 4 years, with a failure to do so leaving an employer liable to a fine of up to €2,500.

To be eligible for paid sick leave, the Bill includes a stipulation that an employee provide his or her employer with a medical certificate signed by a registered medical practitioner. The Irish Congress of Trade Unions have expressed reservation at this element, stating that the high cost of visiting a doctor to certify sick leave will act as barrier to accessing sick leave \(^{16}\). ICTU have therefore argued that in recognition of the fact that out-of-pocket expenses for medical certification will create a barrier for workers exercising their new


\(^{12}\) Ibid.


\(^{16}\) The Irish Times, « Sick pay plans will place “disproportionate cost burden” on employers, says Ibec », op. cit.
right to paid sick leave, they recommend that the Bill be updated to include provision for « limited periods of self-certified sick leave »17.

The rate of pay that is to be paid by the employer under the scheme is not included in the Sick Leave Bill (2021) as that is yet to be determined by in separate regulations, however the in June 2021 the initial regulatory impact assessment referred to a replacement rate of up to 70% of gross salary capped at €110 per day, is based on 2019 mean weekly earnings18.

It is proposed that an employee will be able to make a complaint to the Workplace Relations Commission if an employer does not abide by the statutory sick leave entitlements. The Bill further provides that an employee should not be penalised for exercising or proposing to exercise their statutory sick leave entitlement. This means that there will be a greater obligation on employers to ensure that employees are not being treated differently for taking statutory sick leave.

Conclusion

While the reaction of employee representatives to the legislative change has been largely positive, there have been some reservations and criticism from employer groups, in particular those in the small to medium sector organisations who argue that both the direct and indirect costs associated with the new scheme make it untenable. The Bill also provides if an employer cannot cover paid sick leave for employees, it can apply to the Labour Court for an exemption from paying statutory sick pay due to financial difficulties. If granted, the exemption will be provided for a minimum of three months and a maximum of one year. The leaders of the main employer representative body in Ireland Ibec have claimed that the new scheme as currently envisaged will put « a significant cost to employers, particularly SMEs and those in sectors that have been most impacted by the Covid-19 pandemic »19.

However, ICTUs’ social policy officer described the new scheme as very modest noting it would add no more than 2.5% to labour costs over a four-year period and noted such entitlements for employees were part of being a successful economy20. It has been claimed that the new scheme does not pay sufficient regard to existing employment regulation orders or localised collective bargaining agreement and may go so far as to cause employers to reassess existing policies even reducing their current sick pay scheme benefits21. In terms of the timeline for introduction of the scheme, the Chartered Accountants Ireland (CAI) have raised grave concerns about the new scheme implementation beginning on January 1 2022, claiming that a timeframe of just seven weeks between the announcement and proposed introduction of the scheme leaves « employers, software developers and payroll service operators are being provided with an impossible window in which to analyse the Bill (which is yet to be signed into law) and implement its requirements »22. The Bill is continuing to be reviewed by various committees as it progresses through the legislative process.

17 Ibid.
19 The Irish Times, « Sick pay plans will place “disproportionate cost burden” on employers, says Ibec », op. cit.